

Marine National Monuments

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International Law (Code 10)

On Jan. 6, President George W. Bush created three new marine national monuments: the Marianas Trench Marine National Monument, the Pacific Remote Islands Marine National Monument, and the Rose Atoll Marine National Monument. The Marianas Islands are the southern part of a submerged mountain range that extends 1,565 miles from Guam toward Japan. The Marianas Trench Marine National Monument consists of three components. The first component is the waters and submerged lands encompassing the coral reef ecosystem of the three northernmost islands of the Marianas chain. The second component is the Marianas Trench, and the third component is a series of active undersea volcanoes and thermal vents, primarily located west of the trench.

The Pacific Remote Islands Marine National Monument includes coral reef ecosystems around Kingman Reef, Palmyra Atoll, Johnston Atoll, and Howland, Baker, Jarvis, and Wake Islands. The Rose Atoll Marine National Monument protects the coral reef ecosystem around a remote part of American Samoa.

These monument designations protect roughly 340,000 square miles of the Pacific Ocean, an area larger than California, Oregon and Washington combined. Navy judge advocates played an important role in the designation process, not only in ensuring national security imperatives were considered to maintain the Navy's operational equities, but also in shaping the text of the designations themselves.

The President designated these marine national monuments using his authority under the Antiquities Act of 1906 (16 U.S.C. §§ 431-433), a law which until 2006 had only been used to designate terrestrial national monuments. In June of 2006, however, President Bush used the Antiquities Act to create the Northwestern Hawaiian Islands National Monument (renamed "Papahānaumokuākea Marine National Monument" in 2007).

The Act was originally signed into law by President Theodore Roosevelt. It gave the President the authority to restrict the use of designated land owned by the federal government through executive order. This allowed the President to protect certain lands from excavation and

destruction without undertaking a lengthy Congressional process to create a national park.

Interpreting the Act to permit the designation of a marine national monument is an expansion on a century of executive action that had historically covered only terrestrial territory. The Act gives the President the authority to "declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments." The Act also requires that the monument "in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." Yet, the Papahānaumokuākea Marine National Monument is vast, protecting a predominantly ocean area of 140,000 square miles, making it the largest environmentally protected area in the world (Australia's Great Barrier Reef is second measuring 133,000 square miles).

Given the location of the three new monuments, the Department of Defense, the Joint Staff, and the U.S.

Navy in particular, were deeply immersed in the drafting of that executive order. These efforts ensured the inclusion of language protective of navigation and military activities.

When the President designated the three new

monuments, he issued a statement addressing military activities in the protected areas: "I confirm that the policy of the United States shall be to continue measures established in the Papahānaumokuākea Marine National Monument to protect the training, readiness, and global mobility of U.S. armed forces, and ensure protection of navigation rights and high seas freedoms under the law of the sea." Each proclamation also contains a section entitled "Armed Forces Actions," specifically excluding all activities of the Armed Forces from the prohibitions in each proclamation. With this language, the President ensured that all military activities within the monuments were protected. This is particularly important in the Marianas Trench Marine National Monument, which is located near the Navy's Mariana Islands Range Complex (MIRC).

Further, the proclamations establishing the three monuments contain language protective of navigation rights and freedoms: "The United States continues to act in accordance with the balance of interests relating to tradi-

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tional uses of the oceans recognizing freedom of navigation and overflight and other internationally recognized lawful uses of the sea.”

Navy judge advocates, particularly those in international and environmental law billets in the Office of the Judge Advocate General (OJAG), the Navy Staff, the Navy Secretariat, affected Fleets, and the Joint Staff, worked assiduously to ensure that this language, so critical for Navy operations, was inserted into the President’s statement and in each proclamation. Balancing environmental concerns with Navy operations is not a new problem, as the judge advocates who worked on the recent sonar litigation can attest. And, it is a concern that will not go away anytime soon.

With regard to these new monuments, the need for vigilance has not passed. The executive order designating the monuments states that the Secretaries of Commerce and Interior shall manage the monuments, in consultation with the Secretary of Defense. To do this, a management plan and implementing regulations,

supported by a full-scale environmental impact statement (EIS), will be promulgated through the administrative law process, affording the opportunity for public notice and comment. This provides further opportunities for judge advocates to play an important role in safeguarding the operational capabilities of the Navy. While the monument proclamations include exemptions for military activities, the management plans or EIS’s could potentially include language limiting that exemption. It is the judge advocate’s responsibility to diligently review these documents to ensure that Navy equities continue to be adequately protected.

Each proclamation places some responsibility on the military, of which commanders must be aware. Each proclamation states, “the armed forces shall ensure, by appropriate measures not impairing operations or operational capabilities, that its vessels and aircraft act in a manner that is consistent, so far as is reasonable and practicable” with the proclamations. If a Department of Defense (DoD) component causes

damage to a monument living marine resource from an incident such as a spill or grounding, that DoD component is required to coordinate efforts with the Departments of the Interior or Commerce to mitigate the damage and, if possible, restore the monument to its original state.

Notwithstanding the military exemptions, operational commanders may find it necessary to justify why an activity is necessary for operations or operational readiness and may have to demonstrate why moving those activities to an area outside the monument would be “unreasonable.” These are questions that commands should be prepared to answer, and it is the judge advocate’s responsibility to help answer them.

The Navy has an important interest in the Pacific Ocean and the designation of these areas as marine national monuments will, in one way or another, have an impact on the fleet. By understanding the designations and what they mean, Navy judge advocates can help commanders train and operate while safeguarding these National Marine Monuments.

